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IN THE

Supreme Court of the United States

DONALD H. RUMSFELD, SECRETARY OF DEFENSE,
Petitioner,

v.

JOSE PADILLA,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE CENTER FOR NATIONAL SECURITY STUDIES AND THE CONSTITUTION PROJECT AS AMICI CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the President has authority, either under the Authorization For Use Of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001), or the Commander-in-Chief Clause of Article II of the Constitution, to order the indefinite detention of a U.S. citizen who neither was apprehended in a zone of active combat operations nor is an acknowledged member of the armed forces of a hostile state.

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INTEREST OF AMICI CURIAE[1]

The Center for National Security Studies is a nonprofit, nongovernmental civil liberties organization in Washington, D.C., that was founded in 1974 to ensure that civil liberties are not eroded in the name of national security. The Center has worked for more than 25 years to find solutions to national security problems that protect both the civil liberties of individuals and the legitimate national security interests of the government.

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than amici and their counsel made any monetary contribution toward the preparation or submission of this brief. Letters indicating the parties' consent to the filing of this brief have been submitted to the Clerk.

The Constitution Project is a nonprofit, bipartisan organization based at Georgetown University's Public Policy Institute that seeks to build consensus on and develop solutions to contemporary legal and constitutional issues through a combination of scholarship and public education. After September 11, 2001, the Project created its Liberty and Security Initiative, consisting of a bipartisan, blue-ribbon committee of prominent Americans, to develop recommendations on such issues as the use of military tribunals and the detention of suspected terrorists.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises issues fundamental to this Nation's conception of itself as a republic governed by the rule of law. From our heritage in the English parliamentary and common law systems, as supplemented by our experience in overthrowing monarchical rule, this Nation has derived four irreducible principles of liberty. *First*, no person may be subject to governmental restraint without clear warrant in positive law. *Second*, the legislative, executive, and judicial powers—the powers to make, to enforce, and to construe the law—belong in three separate branches of government, and certainly may not be combined in one person or entity. *Third*, the government must justify any significant and extended deprivation of liberty through some kind of meaningful process in which an individual may present his or her case against detention. *Fourth*, military power, although obviously necessary to the protection of the Nation, must be narrowly confined so as not to supplant civil institutions, including the civil courts.

The position taken by the government in this case imperils all four of these core principles. A cornerstone requirement of due process is that no person may be deprived of liberty without justification in law. To justify the detention of respondent, the Executive must be able to point to some source of law—statutory or constitutional—empowering the President to deprive respondent of his liberty. This the Executive has not done, for no statute authorizes respondent's indefinite detention, and the President's independent military authority under the Constitution does not extend to exercising unreviewable control over a U.S. citizen in the United States who neither was apprehended in a zone of active combat operations nor is an acknowledged member of the armed forces of a hostile state.

Amici do not discount the seriousness of the threat presented by al-Qaeda. In response to the attacks of September 11, 2001, Congress and the President have determined that the exercise of military force abroad against al-Qaeda and its Taliban protectors in Afghanistan was needed to protect the security of the United States. That is the prerogative of those institutions, and the military is today engaged in operations overseas, pursuant to congressional authorization and presidential direction. Should someone bearing arms on behalf of al-Qaeda be apprehended by the military in a zone of active combat operations in Afghanistan, the military would plainly have authority to detain that person to protect the security of U.S. forces, just as it would have authority to detain a member of the armed forces of a hostile state during a declared war. But within the United States, as long as our civil institutions are functioning (as they are now), civil law prevails. Only in very narrow circumstances may the President exercise *military* control over individuals within the United States, and those circumstances are not present here.

For some, the profound sense of anxiety and vulnerability that has resulted from the terrorist attacks against the United States argues for a new paradigm for our government. In this new paradigm, the President is presumed to need unfettered power to address terrorism, and our traditional aversion to expanding power by the military is to be subordinated to the President's authority. But we do not need a new paradigm; the time-tested rule of law is far more than sufficient. Under the rule of law, Congress has the principal responsibility for authorizing deprivations of liberty, such deprivations must be accompanied by fair procedures including neutral tribunals, and civil authority is supreme in carrying out the coercive power of the government. *That* paradigm, which predated and undergirded the crea-

tion of this country two centuries ago, has served us well over time and has been a beacon to the rest of the world. *Cf. United States* v. *Robel*, 389 U.S. 258, 264 (1967) ("It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties ... which makes the defense of the Nation worthwhile."). It should not be abandoned now.

ARGUMENT

I. RESPONDENT'S DETENTION IS NOT AUTHORIZED BY STATUTE

"The President's power, if any, to issue the order [detaining respondent] must stem either from an act of Congress or from the Constitution itself." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 585 (1952). When a power so extraordinary as that claimed in this case is at issue, it is all the more important to be certain whether the power is well grounded in a source of law. The first step, accordingly, is to determine whether any Act of Congress vests the President with the authority to detain an individual, such as respondent, who was not apprehended in a zone of active combat operations and is not a member of the armed forces of any hostile state. As we show, not only is respondent's detention not authorized by statute, it is in fact prohibited by law.

A. The Authorization For Use Of Military Force Against Al-Qaeda Does Not Authorize Respondent's Detention

The government argues principally that Congress's Authorization For Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (AUMF), provides the President with the authority to detain respondent. Pet. Br. 38-44. The AUMF, however, does not expressly authorize detention of any kind. Thus the government's argument must be that a power of indefinite detention is implied in the grant of authority to use military force.

In some circumstances, of course, congressional authorization to the President to use military force includes authorization to the military to detain some individuals. Congress's statutory authorization to use military force activates the President's Commander-in-Chief powers and thus empowers the President to prosecute military operations to successful conclusion and to protect the security of U.S. armed forces in doing so. In deploying military force, the President is entitled to detain individuals where to do so is consistent with the well-settled law of war—centrally, enemy soldiers (i.e., actual members of the armed forces of a hostile state), persons apprehended on the battlefield, and (in some cases) civilians who are citizens of enemy states and who have lent active assistance to hostile forces by (for example) ferrying munitions or battlefield intelligence to the enemy. *See Johnson* v. *Eisentrager*, 339 U.S. 763, 786 (1950); *Ex parte Quirin*, 317 U.S. 1, 37-38 (1942). Where the President's Commander-in-Chief powers are most directly implicated, during the conduct of actual combat operations, the authority to detain such persons flows naturally from congressional authorization to use military force.[2] Thus, when the President, acting pursuant to the AUMF, deployed military force in Afghanistan, he was authorized by Congress to detain combatants captured in actual hostilities. *See Hamdi* v. *Rumsfeld*, 316 F.3d 450, 467 (4th Cir. 2003), *cert. granted*, 124 S. Ct. 981 (2004).[3]

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[2] Even in situations where the President has not been expressly authorized by Congress to use military force overseas—as was the case with the United States' military operations in the former Yugoslavia, *see Campbell* v. *Clinton*, 203 F.3d 19 (D.C. Cir. 2000)—once the President determined to use such military force overseas, his Commander-in-Chief powers would presumably be broad enough to detain persons apprehended in combat situations as well. In such situations, it might be open to question whether the President had authority under the Constitution to engage in combat operations without congressional authorization, but that is a separate question from whether, having done so, he had authority to ensure the safety of U.S. combat forces under his command by, among other things, detaining hostile combatants apprehended in battle.

[3] The fact that the President has authority to detain combatants apprehended in a combat zone does not mean, however, that he has unfettered authority to detain them indefinitely beyond the end of military hostilities, and without process of any kind. For example, a detainee, including a U.S. citizen, who claimed prisoner of war status would be entitled to a proceeding before a tribunal contemplated by Article 5 under the

Those situations, however, are far removed from the present case, which involves an individual who was apprehended in the United States, far from any zone of actual combat operations, and who is not a member of the armed forces of a hostile state. Congress has not extended the President's military powers so far into the domestic sphere. In this regard, it bears emphasis that the AUMF is not an open-ended grant of power to the President to do anything he thinks suitable. Rather, it authorizes the President to use "all necessary *and appropriate* force" against those organizations that aided the terrorist attacks of September 11, 2001. Pub. L. No. 107-40, 115 Stat. 224 (2001) (emphasis added). In carefully choosing the terms "necessary *and appropriate* force," Congress intended that the President not act in violation of either the Constitution or the well-settled law of war, for to do so would not be "appropriate."[4] And the AUMF should be construed to conform to, not conflict with, background principles of constitutional law, *see NLRB* v. *Catholic Bishop*, 440 U.S. 490, 501 (1979), and international law, *see Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

The premise of the government's argument—that under the AUMF, the military could have shot respondent dead, and so the military must also be authorized to detain him—is flawed. Despite the government's use of the label "combatant" to refer to respondent, he does not meet the criteria under the well-settled law of war for a person against whom deadly military force may be deployed. Unlike the individu-

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Third Geneva Convention, in which he could establish his right to treatment as a prisoner of war. *See* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 5, 6 U.S.T. 3316, 75 U.N.T.S. 135. If a detainee were denied such process—as is the case with petitioner Hamdi in *Hamdi* v. *Rumsfeld*, No. 03-6696—he would be entitled to a writ of habeas corpus under 28 U.S.C. § 2241 directing the government to provide him with appropriate procedural rights.

[4] *Cf. Printz* v. *United States*, 521 U.S. 898, 923-924 (1997) (noting that Constitution's grant of power to Congress to enact "necessary and proper" laws does not authorize Congress to enact laws that violate constitutional principles of state sovereignty, as such laws are not "proper").

als tried before military tribunals in *Ex parte Quirin*, 317 U.S. 1 (1942), *In re Territo*, 156 F.2d 142 (9th Cir. 1946), and *Colepaugh* v. *Looney*, 235 F.2d 429 (10th Cir. 1956), respondent is not a member of the armed forces of a hostile state. Nor does respondent fall within any other well-settled category of other persons over whom military control may be exercised under the law of war. For example, respondent was not engaged in battlefield operations when he was apprehended; if he had been so engaged, he would have been subject to military control even if he were not a member of the armed forces of a hostile state (such as, for example, al-Qaeda combatants captured in battle in Afghanistan, or members of the Viet Cong captured during the Vietnam War). Nor is respondent one of the clearly identified leaders of al-Qaeda who planned the September 11 terrorist attacks and who would therefore be the legitimate target of military force (indeed, the government has never even made such a suggestion).

The government has stressed that, in *Quirin*, this Court distinguished *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), where it disapproved use of a military commission to try a non-belligerent sympathizer with the Confederacy, on the ground that Milligan (unlike the Nazi saboteurs in *Quirin*) was not "a part of or associated with the armed forces of the enemy." *Quirin*, 317 U.S. at 45. The government seizes on this language to argue that respondent is "associated with" al-Qaeda and therefore may be subject to exclusively military control. But in using the phrase "associated with the armed forces," the Court in *Quirin* did not grant broad authorization to the President to use military power to indefinitely detain someone in the United States based on a suspicion that that person may be planning acts threatening public safety. To the contrary, U.S. citizens who have been suspected of acting as spies and saboteurs in concert with enemy powers (other than those who, like Haupt in *Quirin*, actually joined an enemy army) have traditionally been prosecuted in civil courts—as was the case with the civilians

who conspired with the Nazi saboteurs in *Quirin*.[5] *See Haupt* v. *United States*, 330 U.S. 631 (1947); *Cramer* v. *United States*, 325 U.S. 1 (1945); *see also infra* pp. 11-12 (discussing Emergency Detention Act of 1950, providing for civilian detention of suspected saboteurs). The Court in *Quirin* was merely accurately reciting the fact that, under the well-settled law of war, certain persons who are not actually enrolled in the armed forces of a hostile state may be seized by the military if they have inserted themselves into combat situations.[6]

The use of military force against an individual such as respondent would also raise grave constitutional concerns. The Fourth Amendment bars the use of deadly force against an individual who does not pose an imminent threat to the safety of others. *See Tennessee* v. *Garner*, 471 U.S. 1 (1985). The government has never argued that respondent ever posed such an imminent threat. Thus, it is simply not the case that the military could have shot respondent dead—as it could shoot dead a member of a hostile army. Moreover, even if respondent were not shot dead, subjecting him to military control would constitute a significant intrusion on the Fifth and Sixth Amendment rights to which he would be entitled if he were prosecuted in civil court. *See Reid* v. *Covert*, 354 U.S. 1, 21 (1957) (opinion of Black, J.).

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[5] This Court was undoubtedly aware, when it issued its opinion in *Quirin* referring to persons "associated with" enemy armies, that the civilians who had conspired with the Nazi saboteurs were being prosecuted in civil courts. Chief Justice Stone announced the opinion for the Court in *Quirin* on October 29, 1942. Cramer's much-publicized treason trial commenced a few days later, on November 9, 1942. *See* J. Woodford Howard, Jr., *The* Cramer *Treason Case*, 1 J. Sup. Ct. Hist. 49, 50 (1996); David J. Danielski, *The Saboteurs' Case*, 1 J. Sup. Ct. Hist. 61, 79 (1996).

[6] *Cf., e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 5, 6 U.S.T. 3316, 75 U.N.T.S. 135 (providing that "[p]ersons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces" may qualify as prisoners of war).

This Court has been skeptical of the argument that congressional authorization to use military force should be implied to include a broad power to subject persons within the United States to military control and to remove them from the purview and protection of civil institutions. In *Duncan* v. *Kahanamoku*, 327 U.S. 304 (1945), for example, the Court rejected the government's argument that a statute granting the Governor of Hawaii the power to place Hawaii under "martial law" necessarily included the power to subject civilians to trial before military tribunals. While accepting that the power to impose "martial law" granted in the act "authorize[d] the military to act vigorously for the maintenance of an orderly *civil government* and for the defense of the island against actual or threatened rebellion or invasion," the Court declined to read the statute as authorizing "the supplanting of courts." *Id.* at 324 (emphasis added); *accord Milligan*, 71 U.S. (4 Wall.) at 127 ("As necessity creates the rule, so it limits its duration, for if [military] government is continued *after* the courts are reinstated, it is a gross usurpation of power."). As the Court stated in *Ex parte Endo*, 323 U.S. 283, 300 (1944):

> In interpreting a war-time measure we must assume that [Congress's] purpose was to allow for the greatest possible accommodation between [civil] liberties and the exigencies of war. We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated they used.

Accordingly, the Court should not construe the AUMF to authorize the military detention of respondent.

B. Respondent's Detention Is Prohibited By 18 U.S.C. § 4001(a)

Not only is respondent's detention not authorized by statute, it is in fact prohibited by 18 U.S.C. § 4001(a), commonly referred to as the Non-Detention Act. Section 4001(a) of Title 18 provides: "No citizen of the United States shall

be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." Accordingly, § 4001(a) precludes respondent's detention by the military unless (as the government argues), it contains an implicit exception authorizing such military detention or is itself unconstitutional.

The government argues that, notwithstanding its sweeping language, Section 4001(a) should be read to preclude detention without statutory authorization *only* by federal civilian authorities, and not by the military. Pet. Br. 44-49. But as this Court has stated, § 4001(a) proscribes "detention of *any kind* by the United States, absent a congressional grant of authority to detain." *Howe* v. *Smith*, 452 U.S. 473, 479 n.3 (1981). Respondent is surely "detained" by military force. Had Congress intended § 4001(a) to govern only civil incarceration, it might have limited the statute's reach to citizens "imprisoned," but it went further to preclude unauthorized detention of *any* kind. Moreover, respondent's detention is surely "by the United States." The military is no less a part of "the United States" than the civil authorities.[7]

More fundamentally, the government's argument would render § 4001(a) essentially nugatory. An example that illuminates the core purpose of § 4001(a) may be helpful. All agree that § 4001(a) was intended centrally to prevent any repetition, without express congressional approval, of this

[7] Although the government presents its "military detention" exception to § 4001(a) as a saving construction of that law, to avoid a purported constitutional clash with the President's Commander-in-Chief powers under Article II of the Constitution, it is not evident what statutory language the government believes may be construed to provide such an exception. The doctrine favoring construction of statutes to avoid constitutional doubt has application only where there is statutory language susceptible of more than one construction. *See Pennsylvania Dep't of Corrections* v. *Yeskey*, 524 U.S. 206, 212 (1998); *Salinas* v. *United States*, 522 U.S. 52, 59-60 (1997). The government points to no such language here. Moreover, the government's construction of § 4001(a) to permit military detention of citizens at the unilateral behest of the President would obviously *create* constitutional concerns, as discussed below. Thus, the statute should simply be construed according to its plain terms.

country's experience with internment camps such as those in which persons of Japanese ancestry were confined during World War II. *See Endo*, 323 U.S. at 291-294; H.R. Rep. No. 92-116, at 5 (1971); *see also* S. Rep. No. 92-304, at 3 (1971) (letter of Sen. Inouye). But if the government's sweeping "military exception" to § 4001(a) were adopted, then the President could, without authorization from Congress, replicate this country's experience with internment camps simply by directing that the camps be run by the military.

The government notes that the World War II camps were administered by a civilian authority, the War Relocation Authority (WRA). Pet. Br. 46. Presumably, this point is meant to suggest that, if the President wished to establish similar camps today under military control, he could do so without running afoul of § 4001(a). But the prohibition of § 4001(a) surely cannot turn on the happenstance of which federal entity sits atop the administrative scheme, and the fact that the World War II camps were administered by the WRA does not demonstrate that the Congress that enacted § 4001(a) would have wanted the President to be able to establish internment camps without congressional authorization merely by placing them under military administration.

Moreover, the government significantly overstates the civilian character of the World War II camps. Although the authority that actually operated the camps, the WRA, was technically not within the armed forces command, the relocation camps were part and parcel of the *military* decision to remove persons of Japanese ancestry from the West Coast.[8] Indeed, the government's brief in *Endo* emphasized that the camps were an integral part of the military's evacuation program.[9] As the government stressed in *Endo*, the camps

[8] The WRA was initially located within the Executive Office of the President, but was subsequently transferred to the Department of the Interior. *See Endo*, 323 U.S. at 287, 290 n.4; Exec. Order 9102, 7 Fed. Reg. 2165 (1942).

[9] *See* U.S. *Endo* Br. 40-41 ("Under the Order relocation is considered to be an integral part of the evacuation from the West Coast. The detention which is an incident to relocation is, therefore, a continued consequence of the evacuation . . . ."), 63 ("The broad terms of the Order make it

were themselves established by military order—specifically, General DeWitt's Public Proclamation No. 8 of June 27, 1942—and it was also that military proclamation that laid down the evacuees' obligation to remain within the camps to which they were transferred. U.S. *Endo* Br. 14, 69, 109-111; *Endo*, 323 U.S. at 285-287. Thus, while the civilian WRA administered the camps, it was a military order that created them and prevented the evacuees from leaving without permission. In addition, it was disobedience of military orders, not regulations of the civilian WRA, that was proscribed by the statute on which the government relied in *Endo* to justify the camps. *See* U.S. *Endo* Br. 62, 69-70; Act of Mar. 21, 1942, Pub. L. No. 77-503, 56 Stat. 173.

Congress well understood that the establishment of the World War II camps was closely bound up with the conduct of military operations against Japan. Congress nonetheless explicitly repudiated any repetition of that experience in the absence of express congressional authorization. That repudiation strongly indicates that Congress was unlikely to have acquiesced in the government's theory here that the President's military authority may be projected far into the domestic sphere.

Indeed, at the same time as it enacted § 4001(a), Congress repealed the Emergency Detention Act of 1950 (EDA), which had provided the statutory authorization for *civilian* detention of persons suspected of espionage and sabotage. *See* Pub. L. No. 92-128, § 2(a), 85 Stat. 347, 348 (1971) (repealing 50 U.S.C. §§ 811-826 (1970)). The EDA gave the President, acting through the Attorney General, the power to detain any person based on a reasonable suspicion that the person would engage in espionage or sabotage. 50 U.S.C. § 813(a) (1970). That power, moreover, was to be exercised only during times of grave "internal security emergency," such as a declared war, invasion, or insurrection. 50 U.S.C. § 812(a) (1970). By repealing the EDA, Congress deemed it too dangerous to civil liberties to allow *civilian* authorities to detain persons on the President's direction on suspicion of planning sabotage, even in time of declared war. It is difficult to believe that the same Congress, in the same statute, intended to allow the President to accomplish the same result merely by acting through the military.[10]

clear that relocation was considered to be a phase of the program of evacuation . . . ."), 70-71 ("Accordingly, the detention of evacuees was ordered under the power . . . to exclude persons of Japanese ancestry from the West Coast . . . .").

II. THE PRESIDENT'S INHERENT CONSTITUTIONAL POWERS DO NOT EXTEND TO INDEFINITE DETENTION OF RESPONDENT

A. The President's Claim To Unilateral Authority Lacks Precedent Or Historical Support

Because respondent's military detention is not authorized by statute, his detention could be consistent with due process only if it were rooted in some other source of law to detain individuals—presumably, the Constitution itself. The President contends that the Commander-in-Chief Clause of Article II of the Constitution vests him with the authority to designate an individual in the United States as an "enemy combatant" and thereby remove him from the reach of the civilian courts, based on his determination that that person intends to engage in conduct harmful to national security, such as sabotage. That claim is a dramatic one, for as this Court has noted in another context—where it rejected the contention that the President's Article II foreign affairs powers, however broad, included the power to deprive an individual of liberty without congressional authorization—"the Constitution creates no executive prerogative to dis-

[10] The EDA in fact provided procedural protections to detainees far greater than those that the government is willing to observe in this case. Any decision to detain had to be justified at a hearing before a preliminary hearing officer, and at any such hearing, a detained person had the right to retain counsel, to remain silent, to introduce evidence on his own behalf, and to cross-examine witnesses against him. 50 U.S.C. § 814(d)-(f) (1970). Any person ordered detained also had the right both to administrative review of the detention decision and to judicial review in the federal courts of appeals. The EDA also expressly preserved the right to habeas corpus. 50 U.S.C. § 815(a), § 826 (1970). In the government's view, of course, respondent has none of these rights.

pose of the liberty of the individual. Proceedings against him must be authorized by law." *Valentine* v. *United States ex rel. Neidecker*, 299 U.S. 5, 9 (1936).

In some respects, the President's claim is similar to a contention that the Executive may impose martial law on selected individuals of its choosing. *See* Frederick Bernays Wiener, *A Practical Manual of Martial Law* 10 (1940) (defining "martial law" as "the carrying on of government in domestic territory by military agencies, *in whole or in part*, with the consequent supersession of *some or all* civil agencies").[11] The government seeks to reassure the Court that the designation of an individual as an enemy combatant is subject to a "careful, thorough, and multi-layered process of review." Pet. Br. 27. But the nub of the matter is that, according to the government, the power to determine whether any particular individual meets the criteria for an "enemy combatant" belongs *alone* to Executive Branch, as part of the President's Commander-in-Chief powers. *Id.*[12] Indeed, according to the government, once the President makes the decision that someone is an "enemy combatant," the basis for that determination may not be questioned anywhere else—and certainly not in the Article III courts.[13] Nor, according

[11] To be sure, the government has not in this case claimed that the President has the military authority to detain all individuals within a broad geographic area. On the other hand, the government's argument that the President may act *selectively* to subject some individuals to military control demands even closer scrutiny than an argument that he may act broadly. As a practical matter, a broad geographic imposition of martial law would demand the utmost justification to gain acceptance from the public. By contrast, the President's assertion of power over a few individuals here and there is unlikely to meet with such careful probing, especially if (as the government argues) it may not be reviewed by the courts.

[12] The government certainly does not suggest, for example, that the review process for determining whether any individual is to be designated as an enemy combatant vests anyone with any rights enforceable anywhere if that process is not followed. Nor does it suggest that the President may not terminate that review process, either as a general matter or for any particular case, whenever he prefers for any reason to do so.

[13] In the district court and before the court of appeals, the government argued that, at most, it need only present "some evidence" to support its detention of Padilla. *See* 243 F. Supp. 2d 42, 54-56 (S.D.N.Y. 2003);

to the government, is it necessary for the government to prove its suspicions before any kind of tribunal, civilian or military. In this case, for example, respondent has been detained for nearly two years in solitary confinement in a naval brig. He can assert no rights; the Executive has offered him no legal protection or access to any tribunal.

This Court has stated that, when military authorities, acting within their proper jurisdiction, determine that an individual has violated the laws of war, "their action is not subject to judicial review merely because they have made a wrong decision based on disputed facts." *In re Yamashita*, 327 U.S. 1, 8 (1946). But that point makes it doubly necessary to make sure that the President has acted within his proper jurisdiction in subjecting an individual to military control, and in this case he has not. The government cites *Johnson* v. *Eisentrager* and *Ex parte Quirin* for the proposition that the President's military authority to seize and detain enemy combatants in wartime is well settled. Pet. Br. 27-28. But the question here is not the broad issue of the President's authority to "detain enemy combatants"; rather, the issue is whether the President may, without legislative authorization, indefinitely detain an individual apprehended on U.S. soil who was not a member of the armed forces of any hostile state because the President suspects that individual of being an "enemy combatant." That claim to power lacks any historical roots.

Resp. C.A. Br. 49. The government advocated a proceeding in which it may make factual assertions, many under seal, that both the court and the detainee must take at face value. *See* 243 F. Supp. 2d at 54-56. According to the government, there are no applicable standards prescribing the content of those allegations and no mechanisms by which the courts can test their reliability. Nor, according to the government, does Padilla have any right to make a presentation of the facts that might contradict the government's assertions. Resp. C.A. Br. 49. In reality, therefore, the "proceeding" advocated by the government is no proceeding at all. If a court may hear only one side of a case—the government's—and may not even probe whether that side is well-founded, and if a detained person (such as respondent) may not present his own case, the detainee might as well have no access to a court at all.

Johnson involved German nationals "in the service of German armed forces" who were apprehended overseas for transmitting military intelligence to "the Japanese armed forces" still engaged in hostilities against the United States, in violation of the terms of Germany's surrender. 339 U.S. at 765-766. Those German nationals therefore fell within the "'well-established' . . . 'power of the military to exercise jurisdiction over members of the armed forces [and] those directly connected with such forces,'" *id.* at 786 (quoting *Duncan*, 327 U.S. at 313-314)—in essence, the same category as those persons described by the Court in passing in *Quirin* as being "associated with" the armed forces of a hostile state (317 U.S. at 45).

In *Quirin*, all the persons tried by military commission were undisputed members of the armed forces of a hostile state. *See* 317 U.S. at 38 (noting that the fact that the saboteurs had buried their uniforms was "essential" to the trial for a violation of the law of war). Moreover, in that case, the Court held that Congress had authorized the trial of such persons by military commission for violations of the law of war, and specifically stated that it was unnecessary to determine whether the President, acting unilaterally, would have had authority to subject such persons to trial by military commission. *Id.* at 29.

With the exception of the government's attempt during the Civil War to remove Northern civilian sympathizers with the Confederacy from the control of civil authorities—an attempt that was, of course, repudiated by this Court in *Milligan*—the government points to no occasion in this country's history during which the President has even attempted to exercise the power to exclude from the civil courts persons who were not either members of the armed forces of a hostile state, like the saboteurs in *Quirin*, or persons apprehended in a combat situation, either actually on the battlefield or (like the detainees in *Johnson*) caught transmitting military intelligence to the armed forces of a hostile state. Whether the President ever could do so consistent with our constitutional traditions is a difficult question, but (as discussed below), at a minimum two things are

clear: he may not do without legislative authorization, and he may not do so absent a pressing emergency such that normal civil institutions are precluded from operating; and even then, his authority to do so would be limited to ensuring that individuals were referred to civil authorities as quickly as possible. *See infra* pp. 17-26.

B. Absent Congressional Authorization, Military Detention, Without The Right To Review Or Process, Of An Individual Apprehended In The United States Who Is Not Subject To Well-Settled Categories of Military Jurisdiction Is Impermissible

As discussed at pp. 9-13, *supra*, Padilla's military detention is prohibited by 18 U.S.C. § 4001(a). This, therefore, is a situation where the President's power "is at its lowest ebb," and the Court could sustain the President's claim to unilateral authority "only by disabling Congress from acting upon the subject." *Youngstown*, 343 U.S. at 637-638 (Jackson, J., concurring). In other words, the Court would have to declare § 4001(a) unconstitutional as applied in this case. It is most unlikely, however, that Congress has acted unconstitutionally in protecting civil liberties in this manner. Although the President has substantial independent authority under the Commander-in-Chief Clause, his authority over the military is not exclusive; Congress has authority "to make all rules necessary and proper to govern and regulate" the armed forces. *See* U.S. Const. art. I, § 8, cl. 14; *see also id.* cl. 12 (vesting in Congress, not the President, the power to raise and maintain military forces).

That power surely authorizes Congress to set boundaries to military control over persons not in the armed forces of this country or a hostile state. The Framers, who well understood the dangers and fears of a standing army but who accommodated the need for national self-defense, *see* The Federalist No. 41 (Madison), could hardly have intended that Congress be required merely to acquiesce in the President's assertions of military control over individuals, no matter how expansive. *See* Decl. Indep. ¶ 14 (assailing George III for "affect[ing] to render the Military independent of and

superior to the Civil Power"); The Federalist No. 69 (Hamilton) (observing that the President's military authority "would be nominally the same with that of the king of Great Britain, but in substance much inferior to it" because it "would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends to the DECLARING of war and to the RAISING and REGULATING of fleets and armies, all which, by the Constitution under consideration, would appertain to the legislature." (footnote omitted)).

But even if the prohibition of § 4001(a) simply did not apply in this case, the point remains that respondent's military detention is not authorized by statute. *See supra* pp. 4-9. Due process requires a source of law for the detention of any individual. Thus, to sustain respondent's military detention, the Court would have to conclude that the President had independent power under Article II of the Constitution to order that detention. That is not an authority that the President has on his own.

The authority claimed by the President to place an individual designated as an "enemy combatant" in indefinite military detention, without the right to process or judicial review in any particular case, resembles a claim to authority to selectively suspend the writ of habeas corpus. Such a claim of authority must not be taken lightly; the Great Writ—the "highest safeguard of liberty," *Smith* v. *Bennett*, 365 U.S. 708, 712 (1961)—has as its historic and "most basic purpose . . . avoiding serious abuses of power by a government, say a king's imprisonment of an individual without referring the matter to a court." *Lonchar* v. *Thomas*, 517 U.S. 314, 322 (1996) (citations omitted). Although the President does not argue that this Court lacks the power to determine whether he generally has *legal* authority to detain persons such as respondent, he does argue that the courts may not inquire into the propriety of such detention in any particular case. *See supra* pp. 14-15. In other words, according to the government, once the determination were made by this Court that the President has authority to designate individuals as unlawful combatants, there could be no future court cases in which his exercise of that authority could be questioned.[14]

The President does not have the unilateral authority to suspend habeas corpus. The clearest signal that congressional authorization would be needed to bar an individual from seeking review of his detention in the civil courts is the constitutional assignment of the authority to suspend the privilege of the writ of habeas corpus to Congress. *See* U.S. Const. art. I, § 9, cl. 2. Indeed, by recognizing the possibility that Congress might suspend habeas corpus in a case of "Rebellion" (*id.*), the Framers anticipated the possible presence on U.S. soil of U.S. citizens who might be "enemy combatants," and yet they made clear that the authority to keep such persons outside the civil courts rests with Congress, not the Executive.

In *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), this Court considered a petition for a writ of habeas corpus by two alleged co-conspirators of Aaron Burr. In considering whether the writ of habeas corpus had been suspended, the Court—answering no—observed that "it is for the legislature to say" whether "the public safety should require the suspension of the powers vested by this act in the courts of the United States." *Id.* at 101. Later, in *Brown* v. *United States*, 12 U.S. (8 Cranch) 110 (1814), this Court considered whether the government could condemn British property

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[14] The government has not disputed that, in this particular case, the courts may resolve whether the President has power under the Commander-in-Chief Clause of Article II to detain individuals as enemy combatants. *Cf. Quirin*, 317 U.S. at 25 (exercising jurisdiction to decide on the merits whether military tribunal had jurisdiction over saboteurs). But according to the government, that is the limit of judicial power in cases such as this, and the courts would have no warrant to determine in any particular case whether the President's Article II authority was properly exercised. Thus, under the government's theory, even if the President seized an individual without any reasonable justification, the courts could not second-guess the President's *military* determination that that person was an "enemy combatant" beyond (at most) inquiring whether it was supported by "some evidence," such as (as in this case) a sealed affidavit that the detainee could not probe or refute. *See supra* pp. 14-15.

captured as a result of an embargo authorized by Congress during the War of 1812. The Court concluded that, even in time of declared war, the right "to take the persons and confiscate the property of the enemy" was an "independent substantive power" of Congress, not the Executive. *Id.* at 122, 126.

The importance of the legislature's role in exerting such extraordinary control over individuals was further emphasized by this Court in *Luther* v. *Borden*, 48 U.S. (7 How.) 1 (1849). There, this Court declined to overturn the imposition of martial law in Rhode Island, but the Court was careful to note that the state legislature had declared martial law. *Id.* at 45-46. The Court distinguished the case before it from commissions issued by the kings of England to proceed "without the concurrence or authority of Parliament." *Id.* at 46.

Ex parte Milligan was, as this case is, about the Executive Branch's claim to a power, without congressional authorization, to subject an individual who was not a member of the armed forces of a hostile state to military rather than civilian control. In *Milligan*, the Court ruled that the military commission that convicted Milligan of assisting the Confederacy was unlawful, and that Milligan was thus entitled to the writ of habeas corpus (unless, presumably, the government proceeded to bring charges against him in civil court). 71 U.S. (4 Wall.) at 130-131. The Court's unanimous conclusion was that, at a minimum, legislative authorization would be required for such a military commission to be valid, and that at least absent congressional authorization, "*[a]ll ... persons*, citizens of states where the courts are open" other than persons "attached to the army, or navy, or militia in actual service ... are guaranteed the inestimable privilege of trial by jury" rather than detention and trial by military tribunal. *Id.* at 123; *see also id.* at 137 (Chase, C.J., concurring) (stressing that Congress had made no such authorization).

These cases are not aberrations. As stated in the opinion in *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487), which rebuked President Lincoln's unilateral attempt to suspend the writ of habeas corpus during the Civil War, "I had supposed it to be one of those points of constitutional law upon which there was no difference of opinion ... that the privilege of the writ could not be suspended, except by act of congress." *Id.* at 148; *see also Ex parte Benedict*, 3 F. Cas. 159, 165 (N.D.N.Y. 1862) (No. 1292) ("[T]he power of suspension is a legislative and not an executive power, and must be exercised, or its exercise authorized, by congress."); *Johnson* v. *Duncan*, 3 Mart. (o.s.) 530, 533 (La. 1815) ("The proclamation of Martial Law ... if intended to suspend the functions of this Court or its members, is an attempt to exercise powers thus exclusively vested in the Legislature."). Thus, since this country's inception, courts have recognized the need for legislative authorization for the power to bar individuals from seeking review of the basis for their detention in civil courts.

C. Military Detention Without Recourse To Civil Courts Requires An Emergency In Which The Civil Courts Cannot Operate

The government's claim fails for yet another reason: indefinite military detention of an individual apprehended in the United States, which has the effect of barring the detained individual from recourse to the civil courts to challenge the basis of his detention, could be justified—if at all—only to the extent that an actual and ongoing emergency is preventing legitimate civil authorities in the relevant geographic area from functioning. Even Congress may suspend habeas corpus only "when in Cases of Rebellion or Invasion the public safety may require it." U.S. Const. art. I, § 9, cl. 2. And when federal military force has been deployed within the United States with legislative authorization, it has been so deployed for the purpose of restoring legitimate civil authority.[15]

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[15] For example, when Congress authorized the use of force during the Civil War to suppress the Confederacy and then instituted temporary military administrations in the Southern States during Reconstruction, it did so because the prior civil authorities had unlawfully rebelled against the Union and no legitimate civil governments had been established to replace them. Moreover, Congress intended the military administrations

Most directly, in *Milligan*, a majority of this Court held that the power to cause the military to try (and, therefore, to detain) a U.S. citizen could be justified only in the case of a "necessity" that must be "actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration." 71 U.S. (4 Wall.) at 127. Moreover, the Court made clear, "[a]s necessity creates the rule, so it limits its duration" and scope, for "[m]artial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction" or outside "the locality of actual war." *Id.*

Milligan had strong roots in Anglo-American law. The principle that military control of individuals who are not members of a hostile army can be justified, if at all, only by an actual and ongoing emergency dates at least to the debates in Parliament in 1628 over the Petition of Right. There, a careful distinction was made between "'an enemy com[ing] into any part where the common law cannot be executed,'" in which case martial law was justifiable as a matter of necessity to maintain order, and the "'tak[ing] of a subject in rebellion,'" for which the subject "if he be not slain at the time of his rebellion" was to be "'tried afterwards and by the common law.'" *Ex parte McDonald*, 143 P. 947, 951 (Mont. 1914) (quoting the views of "such high authorities as Rolle and Coke" as stated by Rolle).[16]

Decisions from the early days of the Republic also demonstrate adherence to the critical distinction between the lawful use of military force to repel invasions and to suppress rebellions and unlawful attempts by the military to mete out punishment afterwards (thus exercising military control over individuals long after the emergency had passed). Individuals subjected to illegal military trials could hold the responsible military officials answerable in tort. *See, e.g., Smith* v. *Shaw*, 12 Johns. 257 (N.Y. Sup. Ct. 1815) (affirming award of damages against military officer who ratified and affirmed the acts of subordinate military officers who subjected plaintiff to an unauthorized court-martial during the War of 1812); *see also In re Stacy*, 10 Johns. 328 (N.Y. Sup. Ct. 1813) (Kent, C.J.) (issuing writ of habeas corpus in wartime against a military commander holding a civilian charged with treason in absence of authority of military to detain him). As the court in *Smith* held, a United States citizen would have been "amenable to the civil authority" if the government believed him to have committed treason, but he "could not be punished, under martial law, as a spy." 12 Johns. at 265.

Against this background of hostility to interference by the Executive with the civilian administration of justice, *Ex parte Merryman* considered and rejected an Executive attempt to claim a similar power to the one the government claims here. With the civil authorities operating, the opinion in *Merryman* refused to find "imprisonment by executive authority" justifiable. 17 F. Cas. at 150. In fact, that opinion confirmed that the purported authorization for Merryman's military detention went "far beyond the mere suspension of the privilege of the writ of habeas corpus" and illegally "thrust aside the judicial authorities and officers to whom the constitution has confided the power and duty of interpreting and administering the laws, and substituted a military government in its place, to be administered and executed by military officers." *Id.* at 152. With the civilian courts open and in the absence of "danger of any obstruction or resistance to the action of the civil authorities," *Merryman* concluded that there was "no reason whatever for the interposition of the military." *Id.*

Thus, by the time *Milligan* was decided, the proposition that "[a]*ll . . . persons*, citizens of states where the courts are

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to assist in the restoration of legitimate civil governments in the formerly rebellious States. *See Texas* v. *White*, 74 U.S. (7 Wall.) 700, 730-731 (1869), *overruled on other grounds*, *Morgan* v. *United States*, 113 U.S. 476 (1885).

[16] *See also Merryman*, 17 F. Cas. at 150 (rejecting the proposition that "in framing a government intended to guard still more efficiently the rights and liberties of the citizen, against executive encroachment and oppression, [the framers of the Constitution] would have conferred on the president a power which the history of England had proved to be dangerous and oppressive in the hands of the crown; and which the people of England had compelled it to surrender, after a long and obstinate struggle on the part of the English executive to usurp and retain it").

open" other than persons "attached to the army, or navy, or militia in actual service ... are guaranteed the inestimable privilege of trial by jury," 71 U.S. (4 Wall.) at 123, rather than detention and possible trial by the military was already well-established.[17] Although the Court recognized in *Quirin* that other persons subject to military jurisdiction under the well-settled law of war might be subjected to military control, including a U.S. citizen *if* he had joined the armed forces of a hostile state, it made no further inroads on the principle of *Milligan*.

Moyer v. *Peabody*, 212 U.S. 78 (1909), does not support the government's position (Pet. Br. 39) that, because the military may use force on certain persons, military detention of indefinite length—whether or not followed by military trials—is a "milder" measure. *Moyer* involved a temporary detainee's *post-release* civil claim for damages based on wrongful imprisonment. The issue addressed by this Court was not whether the plaintiff's detention violated his constitutional rights; indeed, the Court "assume[d]" that the governor lacked "sufficient reason" to detain the plaintiff in the course of putting the insurrection down. 212 U.S. at 84. The issue, rather, was whether the violation had been sufficiently obvious and serious to justify an award of civil damages. *See id.* at 85 (suggesting that a detention longer than reasonably necessary would make an award of damages possible).

[17] The rule of *Milligan*—that citizens cannot lawfully be detained by the military any longer than necessary to restore order and may not be tried by military tribunals when the courts are open, at least in the absence of explicit legislative authorization—was sufficiently well-established by the early twentieth century that the Montana Supreme Court, confronted with a gubernatorial attempt to suspend the writ of habeas corpus and authorize military tribunals at the state level, noted that the rule was the clear "result of the adjudicated cases arising under the national Constitution," so much so that "[i]t would extend this opinion to inordinate length to review them all ...." *McDonald*, 143 P. at 952; *see also Sterling* v. *Constantin*, 287 U.S. 378, 402-403 (1932) (injunction appropriate against enforcement of governor's order limiting private citizens' production of oil, observing that judicial procedure was available and that the courts were "open and functioning."); Wiener, *supra*, at 59 ("Not since the Civil War have federal troops called out in aid of the civil power tried civilians not normally subject to military law by military tribunals.").

Moyer was in essence a decision about what would later be described as Executive officials' qualified immunity from personal liability for their official actions. *Cf. Scheuer* v. *Rhodes*, 416 U.S. 232, 247-248 (1974) (concluding that executive officers may be held personally liable under 42 U.S.C. § 1983 for constitutional torts, although only for actions that were objectively unreasonable in light of the facts as they appeared at the time) (discussing *Moyer*).

In affirming the dismissal of the civil action in *Moyer*, the Court was careful to note that the governor, having "declared a county to be in a state of insurrection" and "called out troops to put down the trouble," "ordered that the plaintiff should be arrested as a leader of the outbreak, and should be detained until he could be discharged with safety, and that then he should be delivered *to the civil authorities, to be dealt with according to law.*" 212 U.S. at 82-83 (emphasis added). *Moyer* thus supports the uncontroversial proposition that the government may use force to suppress unlawful rebellions against legitimate civil authority and may, as part of that power, temporarily detain persons until civil authorities are able to function. But *Moyer* does not fairly suggest that the Executive power includes the power to detain citizens indefinitely or to cause them to be tried by military tribunals when the civilian courts are functioning.

Moreover, the detention of the plaintiff in *Moyer* was relatively brief, a fact that this Court appears to have accorded considerable significance. The short duration of the detention provided little basis upon which to question the reasonableness of the governor's judgment—for purposes of assessing his personal liability—that his actions were truly made necessary by the need to preserve order in the face of an ongoing collapse of legitimate civil government. The Court nevertheless noted the possibility of a future case "in which the length of the imprisonment would raise a different question." 212 U.S. at 85.

The instant case is the case that the Court hypothesized in *Moyer*. Padilla has been detained for nearly two years, and the government denies any obligation to deliver him to the civilian authorities for trial. Yet there is no question

that the courts are open and functioning—as demonstrated by Padilla's initial arrest and detention pursuant to a material witness warrant. At least in the absence of explicit congressional authorization and a pressing emergency preventing the civil courts from operating, therefore, there is no lawful basis for military detention of one such as Padilla, who does not fall within one of the well-settled categories of persons subject to military jurisdiction.

* * * * *

To hold that the rule of law does not apply to any person within the United States—to hold that he may be withdrawn from the purview and protection of the Nation's civil authorities and subjected to the untrammeled military will of the President—is a dramatic thing indeed. Whether that might be constitutional in time of dire emergency, when Congress could not make arrangements for the effective civil government of the Nation, is fortunately not a matter that the Court need consider today. Our civil institutions are safe and well-functioning, and Congress has made no provision for the supplanting of the civil courts by military rule for one such as respondent, who does not fall within one of the well-settled categories of persons to whom "the law of war"—i.e., military authority—may be applied, rather than the exercise of reasoned judgment that is the currency of our judicial system.

At present our armed forces are overseas pursuant to Congress's and the President's determination that their deployment abroad is necessary to the security of the Nation. The unimpaired operation of our civil governmental institutions at home, including the courts, is an essential part of the very national security that our military has been called out to safeguard. The government, though understandably concerned about public safety, seems to have lost sight of this deeper point. According to the government, the President may, when he determines it to be appropriate, subject an individual to the unreviewable control of the military, without any charge or need to show that the detainee has violated any law, and without any process by which the detainee may show that he has been erroneously and improperly detained. The power that the President claims is not faithful to our constitutional values or traditions.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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